

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

April 9, 1998

**IN RE:**

**AVR OF TENNESSEE, L.P. d/b/a HYPERION OF  
TENNESSEE, L.P., APPLICATION FOR A  
CERTIFICATE OF PUBLIC CONVENIENCE AND  
NECESSITY TO EXTEND TERRITORIAL AREA  
OF OPERATIONS TO INCLUDE THE AREAS  
CURRENTLY SERVED BY TENNESSEE  
TELEPHONE COMPANY**

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) **Docket No.: 98-0001**  
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**ORDER DENYING HYPERION'S APPLICATION FOR A CERTIFICATE OF PUBLIC  
CONVENIENCE AND NECESSITY TO EXTEND ITS SERVICE TERRITORY INTO  
AREAS CURRENTLY SERVED BY TENNESSEE TELEPHONE COMPANY**

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On March 10, 1998, this matter came before the Tennessee Regulatory Authority (the "Authority") at a regularly scheduled and properly noticed Directors' Conference, for a decision on the Application of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") for a Certificate of Public Convenience and Necessity ("CCN") to extend its territorial area of operations to include the areas currently served by Tennessee Telephone Company. Hyperion's pleading will be referred to hereinafter as the "Application."

**BACKGROUND**

On January 2, 1998, Hyperion filed its Application, pursuant to Tenn. Code Ann. § 65-4-201(b), and requested that the Authority interpret Section 253(a) of the federal Telecommunications Act of 1996 (the "Act") as a prohibition against the enforcement of Tenn. Code Ann. § 65-4-201(d), to the extent that Tenn. Code Ann. § 65-4-201(d) would deny

Hyperion the ability to provide competing telecommunications services within the service territory of Tennessee Telephone Company.<sup>1</sup> On January 14, 1998, Tennessee Telephone Company, Concord Telephone Company, Tellico Telephone Company and Humphreys County Telephone Company (collectively "the Intervenors") jointly petitioned to intervene in this matter.

On February 3, 1998, this matter came to be heard at a properly noticed Directors' Conference for the purposes of considering the joint intervention petition of the Intervenors and appointing a pre-hearing officer. The Directors unanimously granted the joint petition to intervene, and, at the suggestion of the parties, determined that this matter could be resolved without the necessity for the appointment of a pre-hearing officer. The parties were instructed to file initial and reply briefs on the legal issues involved in this matter, and the same were timely filed in accordance with the Authority's schedule.<sup>2</sup> The briefed positions of the parties may be summarized as follows:

HYPERION:

1. By order of the Authority's predecessor, the Tennessee Public Service Commission (the "TPSC"), Hyperion holds a CCN to provide telecommunications services as a competing telecommunications provider throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in Tennessee.<sup>3</sup> The TPSC's Order, relying upon Tenn. Code Ann. § 65-4-201(d), restricts Hyperion

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<sup>1</sup> On the authority of Tenn. R. Civ. P. 24.04, the Authority's Executive Secretary provided notice to the Tennessee Attorney General that the validity of Tenn. Code Ann. 65-4-201(d) was drawn into question in this matter. The Attorney General did not elect to participate, either by written argument or through oral argument.

<sup>2</sup> By letter dated February 4, 1998, Hyperion waived any rights to enforce the statutory deadline provided in Tenn. Code Ann. § 65-4-201 requiring the entry of an order no more than sixty (60) days from the filing of the application for certification of a competing telecommunications service provider.

<sup>3</sup> Public Service Commission Order entered in Docket No. 94-00661 on August 24, 1995, p.9, ¶15, attached to Hyperion's Application as Exhibit 1.

from competing against Tennessee Telephone Company in its protected service area.<sup>4</sup> In so doing, the TPSC granted to Tennessee Telephone Company a protected monopoly status that undermines competition in contradiction of the goals of the Act.

2. In In re Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling ("Silver Star"),<sup>5</sup> the Federal Communications Commission ("FCC") ruled that 47 U.S.C. § 253(a) "at the very least proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."<sup>6</sup> Tenn. Code Ann. § 65-4-201(d) is a proscribed state legal requirement when it is applied to Hyperion for the purpose of prohibiting Hyperion's access to Tennessee Telephone Company's service area.

3. The FCC's position in In re the Public Utility Commission et. al. Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995 ("the Texas Preemption Decision")<sup>7</sup> confirms the FCC's stated intention to preempt state statutes such as Tenn. Code Ann. § 65-4-201(d), if and/or when such statutes are applied by state agencies to prohibit or have the effect of prohibiting local exchange carriers such as Hyperion from providing telecommunications services within the state.

4. The Supremacy Clause of Article VI of the Constitution of the United States provides Congress with the power to preempt state law. Among other times, preemption may

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<sup>4</sup> The TPSC's Order did not restrict Hyperion from seeking the voluntary cooperation of Tennessee Telephone Company in opening its service area to cooperation, nor did it purport to limit Hyperion's entry into that service area upon any other action of Tennessee Telephone Company as provided in Tenn. Code Ann. § 65-4-201(d).

<sup>5</sup> Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1 (September 24, 1996) (attached to Hyperion's Application as Exhibit 3).

<sup>6</sup> Id. at ¶ 38.

<sup>7</sup> Memorandum Opinion and Order, FCC 97-346, CCB Pol 96-13, 96-14, 96-16, and 96-19 (October 1, 1997). This is a combined case involving the petitions of numerous parties.

occur when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, or when there is an actual or outright conflict between federal and state law. Preemption may result not only from action taken by Congress itself, but also from a federal agency acting within the scope of its congressionally delegated authority.

5. Tenn. Code Ann. § 65-4-201(d) has been preempted by Congress' enactment of 47 U.S.C. § 253(a) and by the FCC's action in Silver Star and the Texas Preemption Decision.

6. Under 47 U.S.C. §§ 251(a) and 251(b), "both Hyperion and Tennessee Telephone Company have the obligation to provide each other with interconnection, resale, number portability, dialing parity, and access to rights-of-way."<sup>8</sup> Hyperion seeks to enforce its rights under those sections of the Act and to "offer its own services over its own facilities."<sup>9</sup>

7. 47 U.S.C. § 251(c) imposes additional obligations on incumbent local exchange carriers; however, Hyperion does not seek to enforce such additional obligations on Tennessee Telephone Company at this time. Specifically, Hyperion does not seek interconnection under 47 U.S.C. § 251(c)(2), unbundled access to network elements under 47 U.S.C. § 251(c)(3), resale of retail services at wholesale rates under 47 U.S.C. § 251(c)(4) or collocation under 47 U.S.C. § 251(c)(6).

8. 47 U.S.C. § 253(b) provides limited protection for certain state requirements; however, any such requirements must be competitively neutral and consistent with 47 U.S.C. § 254, and necessary to preserve and advance universal service, to protect public safety and welfare, to ensure continued quality of telecommunication services and to safeguard the rights of consumers. The FCC has determined that the requirements of Section 253(b) were not met in Silver Star and the Texas Preemption Decision, and the conclusion must be the same in this case

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<sup>8</sup> Hyperion's Application, p.9.

<sup>9</sup> Id.

because the incumbent protection provisions already preempted by the FCC are virtually identical to Tenn. Code Ann. § 65-4-201(d).

9. By allowing Hyperion into Tennessee Telephone Company's service area, the goals of the Tennessee legislature will be furthered and the public will be generally benefited by increased competition, access to new technologies, increased efficiencies and cost savings.

THE INTERVENORS:

1. The Authority is a state regulatory agency charged with enforcing the laws of Tennessee, including Tenn. Code Ann. § 65-4-201(d). If the Authority applies Tenn. Code Ann. § 65-4-201(d) to the case at hand, Hyperion's application must be denied.

2. The Authority may not determine whether Tenn. Code Ann. § 65-4-201(d) has been preempted by federal law because an administrative agency does not have the power to declare a statute void or otherwise unenforceable. Moreover, administrative agencies have considerable factual and technical expertise within their fields, but they are not designed to engage in rigorous analysis of complex legal issues like preemption.

3. Hyperion's application constitutes a facial constitutional challenge to the Tennessee statute, and Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446, 454 (Tenn. 1995) held that "[t]he facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding."

4. The Authority is not bound by the FCC's decision in Silver Star. In that proceeding, the FCC was presented only with the question of whether a Wyoming statute violates subsections (a) or (b) of 47 U.S.C. § 253. It did not consider whether Tenn. Code Ann. § 65-4-201(d) violates subsections (a) or (b) of 47 U.S.C. § 253. Moreover, as two (2) petitions for reconsideration are still pending in the Silver Star case, the FCC's decision is not a final ruling.

5. 47 U.S.C. § 253(d) envisions that preemption determinations should be made on a case by case basis by the FCC, after notice and an opportunity for public comment can be had. The FCC has not yet reviewed Tennessee's statute, and no notice and hearing have been had at the FCC level on the enforceability of Tennessee's statute.

6. The Act does not contain an express provision that mandates preemption of Tenn. Code Ann. § 65-4-201(d). The sections of the federal law cited by Hyperion and relied upon by the FCC in Silver Star do not require the preemption of state laws limiting competitive access to rural markets served by small incumbent local exchange telephone companies.

7. Hyperion claims it does not presently seek interconnection with Tennessee Telephone Company under 47 U.S.C. § 251(c); however, Hyperion has made inconsistent statements in this regard to Tennessee Telephone Company. Thus, the Authority should not permit Hyperion to seek interconnection pursuant to 47 U.S.C. § 251(c). If the Authority decides to grant Hyperion's application, and should later be faced with a request for interconnection pursuant to 47 U.S.C. § 251(c), then the Authority should refuse to terminate Tennessee Telephone Company's rural carrier exemption provided for by 47 U.S.C. § 251(f)(1).

### ACTION BY THE AUTHORITY<sup>10</sup>

This matter came next to be heard on March 10, 1998, at a regularly scheduled Directors' Conference. Without oral argument of the parties, but after review of the record, the Authority unanimously agreed that Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446 (Tenn. 1995) did not preclude the Authority from deciding the issues in this matter, as the Authority considered Hyperion's Application to be an "as applied" challenge to the constitutionality of Tenn. Code Ann. § 65-4-201(d), rather than a challenge to the facial constitutionality of said statute.

On the preemption issue, the Authority voted 2-1 in favor of denying Hyperion's Application.<sup>11</sup> As a preface to acting on Hyperion's Application, Director Malone, expressing the majority view, stated:

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<sup>10</sup> The statutes at issue in this matter provide in part as follows:

Tenn. Code Ann. § 65-4-201(d):

"Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the June 6, 1995."

47 U.S.C. § 253:

"(a) IN GENERAL. - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY. - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

<sup>11</sup> Chairman Lynn Greer disagreed with the majority's position, stating:

As I see it, we have a direct conflict between a federal law and one of our state statutes, and federal law must prevail. I believe the federal Act obviously preempts our state statute Tenn. Code Ann. § 65-4-201(d), pursuant to the Supremacy Clause of Article VI of the United States Constitution. . . . I believe that upholding the Tennessee statute in this case would undermine competition and therefore contradict the goals of the

Tenn. Code Ann. § 65-4-201(d) is currently the law in the state of Tennessee as both parties have acknowledged. Recognizing this fact, I am not sitting as a policymaker on this piece of legislation. Whether I support the enactment of Section 65-4-201(d) is irrelevant. As noted by the court in Hamblen Cty Educ. Ass'n v. The Hamblen Cty Brd of Education, 892 S.W.2d 428, 432 (Tenn. App. 1994), "[i]t is not for the courts to question the wisdom of legislative enactments. We 'must take statutes as we find them.'" Therefore, as a Director of the TRA, it is not my place to question the wisdom of the general assembly.

Transcript of March 10, 1998, Directors' Conference, p. 9. Acting upon the Application, the majority then opined that the plain language of Section 253(a) of the Act appears to preempt Tenn. Code Ann. § 65-4-201(d). Still, as the FCC noted in the Texas Preemption Decision, if a challenged law or regulation satisfies the requirements of Section 253(b) of the Act, Section 253(a) does not act to preempt it. In other words, according to the FCC, Section 253(b) operates as a limitation upon any preemptive challenge launched by Section 253(a). Therefore, in the opinion of the majority, prior to concluding that § 65-4-201(d) is preempted by Section 253(a), it is imperative that the application of Section 253(b) be evaluated.

The Authority concluded that Tenn. Code Ann. § 65-4-201(d) is essential to preserving universal service within Tennessee, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers. The Authority so concluded on the basis that many of the small, independent local exchange companies and telephone cooperatives in Tennessee serve small areas with relatively few customers, and, typically, such small serving areas include a few large business customers whose revenues support the provision of affordable service to the companies' residential customers. If a competitor were

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Telecommunications Act. . . . Obviously the Tennessee General Assembly felt very strongly about its position in this matter, and I have great respect for its opinion. However, I do believe that the federal statute is unambiguous and must prevail.

Transcript of March 10, 1998, Directors' Conference, pp. 7-8.



to begin serving the large business customers of the incumbent, a significant amount of universal service support could be lost, with residential and small business rates having to suffer an increase in order to make up for possible lost revenue. The Authority further concluded that such rate increases could jeopardize universal service within Tennessee.

Regarding the importance of preserving universal service, it is the position of the Authority that:

In the preamble to the Tennessee Telecommunications Act of 1995,<sup>12</sup> the Tennessee General Assembly stated that 'It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market.' Further the Assembly stated that 'Universally affordable basic telephone service should be preserved.' Thus, the purpose of the Act is two-fold: to foster the development of competition, and to preserve universal service. Among other things, Section 65-4-201(d) ensures that for a period of time universal service is not disrupted while permanent universal service mechanisms are considered in the more rural areas of the state. The general assembly concluded that prematurely opening up the more rural areas of the state to competition without some transition period could result in untold consequences that may have substantial harmful effects on universal service in said areas.<sup>13</sup>

In order to ensure that rural consumers receive both the benefits of the development of an efficient technologically advanced statewide system of telecommunications and universal service during the introductory stages of competition in this previously monopolistic market, the General Assembly passed Section 65-4-201(d). Thus, Section 65-4-201(d) is, . . . as Section 253(b) requires, consistent with both state and federal universal service goals and objectives. In fact, . . . today, absent 65-4-201(d), the universal service objectives in Tennessee would not be advanced in rural areas and the goals of federal universal service may be irreparably undermined.

Transcript of March 10, 1998, Directors' Conference, pp. 10-11.

The requirement of competitive neutrality under Section 253(b) of the Federal Act was recognized as a more difficult inquiry. On that issue, the Authority found that Tenn. Code Ann. § 65-4-201(d) is competitively neutral because its restriction on entry into the service areas of

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<sup>12</sup> 1995 Tenn. Pub. Acts 408.

<sup>13</sup> Director Sara Kyle stated, for the record, her belief that the Tennessee legislature's policy was sound in promulgating Tenn. Code Ann. § 65-4-201(d).

small local exchange companies applies to all telecommunications service providers within the State. No provider is given a competitive advantage over any other in the areas served outside of the small local exchange companies' service territories. Also, Tenn. Code Ann. § 65-4-201(d) allows equal entry by all telecommunications service providers into the territories of a small local exchange company in the event that such small local exchange company seeks and is granted the authority to compete outside of its authorized service area.

Moreover, given the legislature's rationale for enacting § 65-4-201(d), the language of Section 253(b) as a whole, Section 65-4-201(d)'s pronouncement that any such protected incumbent forfeits its protection if it seeks to compete outside of its area, and the requirement that the general assembly review this statute every two years<sup>14</sup>, this statute may be held competitively neutral. In fact, with respect to all competitors, large or small, § 65-4-201(d) may be viewed as being unwaveringly competitively neutral.

If Section 253(b) is interpreted too narrowly, Section 253(b) may be read out of the statute, which is clearly not what Congress intended. To be sure, the Authority fully recognizes and respects the possibility that the FCC's application of Section 253(a) in circumstances similar to those presented in this matter may eventually become the law of the land. Conversely, however, it remains plausible that the FCC's interpretation, to the extent that it demands a different result than that adopted by the majority herein, may be in error. See cf., Iowa Utilities Board v. FCC, et al., 120 F.3d 753 (8th Cir. 1997) ("[W]e conclude that the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act."). At this early stage of the development of the interpretation of Section 253(a), however, the Authority has determined that

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<sup>14</sup> See Tenn. Code Ann. § 65-5-211.

it would be premature to capitulate at this point, especially in light of the intent of the Tennessee General Assembly in enacting Tenn. Code Ann. § 65-4-201(d), and in protecting universal service in Tennessee. It may take some time for the FCC and perhaps the courts to hone the interpretation of Section 253 of the Act.

It is the opinion of the majority that Sections 253(a) and (b) of the Act must be read together, and when done so, there is little doubt that Congress intended that states retain the authority to preserve, protect, and promote universal service. Tenn. Code Ann. § 65-4-201(d) satisfies the requirements of Section 253(b) of the Act<sup>15</sup> and, therefore, Section 253(b) operates as a limitation upon Hyperion's preemptive challenge under Section 253(a) of the Act.

For the foregoing reasons, the Authority denies Hyperion's application pursuant to Section 253(b) of the Act.

**IT IS THEREFORE ORDERED THAT:**

1. Hyperion's Application for a Certificate of Public Convenience and Necessity to extend its territorial area of operations to include the areas currently served by Tennessee Telephone Company is hereby denied;
2. Any Party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days of the date of this Order; and

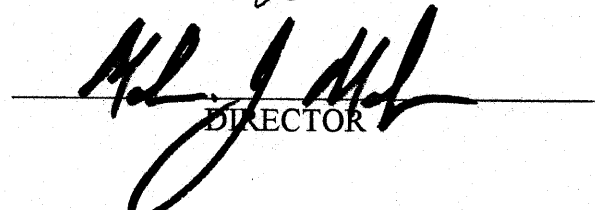
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<sup>15</sup> Codified as 47 U.S.C. § 253(b).

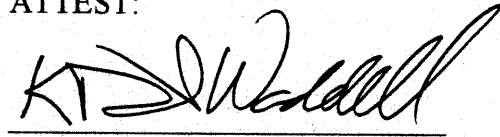
3. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition For Review in the Tennessee Court of Appeals, Middle District, within sixty (60) days of the date of this Order.

  
CHAIRMAN

  
DIRECTOR

  
DIRECTOR

ATTEST:

  
EXECUTIVE SECRETARY